

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

Paper No. 16

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RAYMOND M. SCOTT

Appeal No. 2004-0415
Application No. 09/764,743

ON BRIEF

Before KIMLIN, PAK, and KRATZ, *Administrative Patent Judges*.

PAK, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on an appeal under 35 U.S.C. § 134 from the examiner's refusal to allow claims 1 through 4, which are all of the claims pending in the above-identified application.

According to the appellant (Brief, page 5):

Claims 1, 2 and 4 form a first group of claims, and claim 3 forms a second group of claims that stand or fall separate.

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Therefore, for purposes of this appeal, we select claims 1 and 3 and determine the propriety of the examiner's rejections based on these claims alone consistent with 37 CFR § 1.192(c)(7)(2002). Claims 1 and 3, which are representative of the subject matter on appeal, are reproduced below:

1. In a shopping cart having a basket having a front opposite a rear and forming an upper opening circumscribed by an upper peripheral rim, a handle supported at the rear, and said cart rolled and supported on a pair of laterally rotatable, front castor wheels opposite a pair of non-pivoting rear wheels, wherein the improvement comprises:

a spring urged brake mechanism capable of selectively impinging against said rear wheels in order to provide a breaking force; and

means for releasing said impinging when two respective shopping carts are nested together.

3. The improvement of Claim 2, wherein said spring urged brake mechanism comprises:

an actuation lever mounted in an articulated manner near or to the handle and in mechanical communication with the spring urged brake mechanism by an actuation cable; and

actuation guide means for allowing the mechanical communication of a brake release force from a location remove from the spring urged brake mechanism in a manner that avoids obstruction of or access to the nesting access area.

The prior art references relied upon by the examiner are:

Trimble et al. (Trimble)	5,499,697	Mar. 19, 1996
Nolting, Jr. et al. (Nolting)	6,123,343	Sep. 26, 2000

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The appealed claims stand rejected as follows:

1) Claims 1, 2 and 4 under 35 U.S.C. § 103 as unpatentable over the disclosure of Trimble; and

2) Claim 3 under 35 U.S.C. § 103 as unpatentable over the combined disclosures of Trimble and Nolting.

We have carefully considered the appellant's arguments in the Brief, but we are not persuaded of reversible error in any of the examiner's Section 103 rejections. Accordingly, we affirm the examiner's decision rejecting claims 1 through 4 under 35 U.S.C. § 103 for the findings of fact and conclusions set forth in the Answer and below.

Under 35 U.S.C. § 103, to establish a ***prima facie*** case of obviousness, there must be some objective teachings or suggestions in the applied prior art and/or knowledge generally available to a person having ordinary skill in the art that would have led such person to arrive at the claimed subject matter.

See, generally, In re Oetiker, 977 F.2d 1443, 1447-48, 24 USPQ2d 1438, 1446-47 (Fed. Cir. 1992) (Nies, J., ***concurring***); ***In re Vaeck***, 947 F.2d 488, 493, 20 USPQ2d 1438, 1442 (Fed. Cir. 1991).

The knowledge generally available to one of ordinary skill in the art includes the appellant's admission regarding what was known

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in the art at the time of the appellant's invention. **See In re Nomiya**, 509 F.2d 566, 570-71, 184 USPQ 607, 611-12 (CCPA 1975) (an applicant's admitted prior art may be used in determining the patentability of a claimed invention); **see also In re Davis**, 305 F.2d 501, 503, 134 USPQ 256, 258 (CCPA 1962).

Here, we observe that claim 1 on appeal is written in Jepson format. **Ex parte Jepson**, 243 Off. Gaz. Pat. Off. 525 (Comm'r Pats. 1917). Thus, the subject matter recited in the preamble of appealed claim 1 is impliedly admitted to be old in the art. **In re Ehrreich**, 590 F.2d 902, 909, 200 USPQ 504, 510 (CCPA 1979); **In re Aldrich**, 398 F.2d 855, 857, 158 USPQ 311, 312 (CCPA 1968).

Specifically, the appellants impliedly admit that it was known at the time of the invention

a shopping cart having a basket having a front opposite a rear and forming an upper opening circumscribed by an upper peripheral rim, a handle supported at the rear, and said cart rolled and supported on a pair of laterally rotatable, front castor wheels opposite a pair of non-pivoting rear wheels

The appellants also have not challenged the examiner's official notice that such shopping cart is well known. Compare the Answer, pages 3 and 4 with the Brief in its entirety. Allegedly, the appellants' invention involves an improvement in the

admittedly old shopping cart, wherein improvement is said to include the implementation of:

[A] spring urged brake mechanism capable of selectively impinging against said rear wheels in order to provide a braking force; and

[M]eans for releasing said impinging when two respective shopping carts are nested together.

The dispositive question is, therefore, whether one of ordinary skill in the art would have been led to employ the above improvement in the old shopping cart. On this record, we answer this question in the affirmative.

As is apparent from this record, the appellants do not dispute the examiner's finding¹ that:

Trimble teaches a conventional shopping cart comprising front and rear wheels, a basket with an upper rim (Figure 1) and a spring (60) urged brake mechanism capable of selectively impinging against the rear wheels (Figure 1) in order to provide a braking force, and

means for releasing said impinging when two respective shopping carts are nested (lines 18-21 of column 6).

In other words, the appellants do not dispute that Trimble teaches the claimed improvement, i.e., the claimed spring urged brake mechanism and releasing means. See also Trimble, column 5, lines 10-62 and column 6, lines 7-25. According to Trimble

¹ Compare the Answer, page 3, with the Brief in its entirety.

(column 6, lines 26-31), such brake mechanism and releasing means

can be applied to almost any shopping cart in any retail environment. It is easy to use, and does not alter the function of the cart in any way. It simply allows the cart to be rendered immobile in a parking lot. With this advantage, the present invention makes a practical addition to any cart.

Under these circumstances, we determine that it would have been **prima facie** obvious to implement the claimed brake mechanism and releasing means in the admittedly old shopping cart. One of ordinary skill in the art would have been led to employ the claimed brake mechanism and releasing means in the admittedly old shopping cart in the manner taught by Trimble, motivated by a reasonable expectation of successfully obtaining the advantages indicated above.

The appellant argues that Trimble's brake cable 74 "spans the rear nesting opening of the cart, and would therefore cause interference in the nesting of successive carts with such a design." See the Brief, page 6. This argument fails from the outset since it is not based on limitations appearing in claim 1 on appeal. **In re Self**, 671 F.2d 1344, 1348, 213 USPQ 1, 5 (CCPA 1982).

Even if we were to determine that such limitations are present in claim 1, our conclusion would not be altered. As

indicated ***supra***, Trimble teaches that the claimed brake mechanism and releasing means should be employed in a manner that would not alter the operation of a shopping cart. As also found by the examiner (pages 4 and 5):

Trimble teaches actuation lever (12 on Figure 1) mounted near a handle in mechanical communication (14) with the spring urged brake mechanism and actuation guide means (Figured 3 and 6) that avoids obstruction or access to the nesting access area (Figure 1 and lines 18-21 of column 6).

Thus, from our perspective, one of ordinary skill in the art armed with such knowledge would have been led to place the brake cable described in Trimble at a location that would not interfere with the operation of the rear nesting opening of the admittedly old shopping cart as taught by Trimble.

With respect to claim 3 on appeal, the examiner acknowledges that Trimble illustrates what appears to be a rigid bar, rather than a cable, as a means for connecting its actuation means and brake mechanism in Figure 1. To remedy this deficiency, the examiner further relies on the disclosure of Nolting. The examiner finds (Answer, page 5), and the appellants do not dispute (Brief, pages 6-9), that:

Nolting Jr. teaches a shopping cart braking mechanism where the actuation means is mechanically connected to the brake mechanism by a cable (54). Utilizing a flexible cable for a mechanical communication between a brake actuation means and a wheel brake mechanism is advantageous over a

rigid bar in that the cable is lighter, cable conforms to the geometry of the cart more easily, which makes for better appearance and lessens the possibility of inadvertent movement of the mechanical communication by being bumped.

Thus, we concur with the examiner (Answer page 5) that:

it would have been obvious to one of ordinary skill in the art at the time the invention was made to utilize a cable for the mechanical communication between the actuation lever and brake mechanism of Trimble, as taught by Nolting, Jr.

The appellant only argues that Nolting does not teach the features recited in claim 1. See the Brief, page 6. In so arguing, the appellant ignores that the obviousness test under Section 103 is not what the prior art references individually teach, but what their combined teachings would have fairly suggested to a person having ordinary skill in the art. ***In re Young***, 927 F.2d 588, 591, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991); ***In re Keller***, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). When the teachings of Trimble and Nolting are collectively considered, we determine that there is ample suggestion to arrive at the subject matter recited in claim 3 as indicated ***supra***.

In view of the foregoing, we affirm the examiner's decision rejecting claims 1 through 4 under 35 U.S.C. § 103.

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No time period for taking any subsequent action in
connection with this appeal may be extended under 37 CFR
§ 1.136(a).

AFFIRMED

EDWARD C. KIMLIN)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
CHUNG K. PAK)	APPEALS AND
Administrative Patent Judge)	INTERFERENCES
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PETER F. KRATZ)	
Administrative Patent Judge)	

CKP/hh

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